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QUESTION PRESENTED

Whether Louisiana Revised Statutes §§ 18:511(A), 18:1272(A), and 18:402(B)(1), which in combination permit congressional elections to occur on the first Saturday of October of an election year, are preempted by 2 U.S.C. §§ 1 and 7, which require that congressional elections occur on the "Tuesday next after the first Monday in November" of an election year.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 4, cl. 1 of the U.S. Constitution:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Article VI, cl. 2 of the U.S. Constitution:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2 U.S.C. § 1:

§ 1. Time for election of Senators

At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said State shall be elected by the people thereof for the term commencing on the 3d day of January next thereafter.

2 U.S.C. § 7:

§ 7. Time for election

The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter.

2 U.S.C. § 8:

§ 8. Vacancies

The time for holding elections in any State, District, or Territory for a Representative or Delegate to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively.

Louisiana Revised Statute § 18:401

§ 401. Purpose and nature of primary and general elections

A. Purpose. Primary and general elections are held to elect persons to Congress and to all the elective offices in this state, except the office of presidential elector.

B. Nature. All qualified voters of this state may vote on candidates for public office in primary and general elections without regard to the voter's party affiliation or lack of it, and all candidates for public office who qualify

for a primary or general election may be voted on without regard to the candidate's party affiliation or lack of it.

Louisiana Revised Statute § 18:402(B)

§ 402. Dates of primary and general elections

B. Congressional elections. Elections for members of Congress and officers elected at the same time as members of Congress shall be held every two years, beginning in 1982.

(1) Congressional primary elections shall be held on the first Saturday in October of an election year.

(2) Congressional general elections shall be held on the first Tuesday after the first Monday in November of an election year.

Louisiana Revised Statute § 18:481

§ 481. Candidates who qualify for a general election

The candidates who qualify for each office remaining to be filled in the general election are those who received the two highest numbers of votes, the four highest numbers of votes, and so on among those not elected in the primary election, until the maximum number of candidates for each office on the general election ballot is reached.

Louisiana Revised Statute § 18:511

§ 511. Election of candidates in a primary election

A. Majority vote. A candidate who receives a majority of the votes cast for an office in a primary election is elected. . . .

B. Election of unopposed candidates for public office. If, after the close of the qualifying period for candidates in a primary election, the number of candidates for a public office does not exceed the number of persons to be elected to the office, the candidates for that office, or those remaining after the withdrawal of one or more candidates, are declared elected by the people, and their names shall not appear on the ballot in either the primary or the general election.

Louisiana Revised Statute § 18:1271

§ 1271. Applicable laws

Except as otherwise specifically provided in this Part, United States senators and representatives in Congress shall be elected as provided in this Title for the election of public officers.

Louisiana Revised Statute § 18:1272

§ 1272. United States senators, representatives in Congress; time of electing

A. All general elections for representatives in Congress, sometimes referred to in this Title as congressional elections, shall be held on the first Tuesday

next following the first Monday in November, 1982, and every two years thereafter. The primary election shall be held on the first Saturday in October next preceding the date of the general election.

B. One United States senator shall be elected in the year 1980, and every six years thereafter, at the same time and at the same polling places as representatives in Congress. In the same manner, one United States senator shall be elected in the year 1978, and every six years thereafter.

STATEMENT OF THE CASE

Respondents G. Scott Love, Paul S. Bergeron, Kathleen B. Balhoff, and Bennie Baker-Bourgeois (the "Voters") are registered Louisiana voters who reside in East Baton Rouge and Lafourche parishes. They commenced this action against Petitioners (the "State" or "Louisiana") for declaratory and injunctive relief under 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201, 2202 on August 8, 1995 in the United States District Court for the Middle District of Louisiana. The Voters' complaint alleged that Louisiana Revised Statutes §§ 18:402(B)(1), 18:511(A), 18:1271, and 18:1272, which in combination provide for congressional elections to take place on the first Saturday of October of an election year, violate 2 U.S.C. §§ 1 and 7, which require that congressional elections occur on the "Tuesday next after the 1st Monday in November" of an election year. J.A. 18 ¶ 44.

The parties promptly filed cross-motions for summary judgment. In support of the Voters' motion for summary judgment, the Voters submitted a statement of material facts which they contended were undisputed and presented no issue for trial:

- The Voters are U.S. and Louisiana citizens and are registered to vote in Louisiana. The Voters have voted in previous federal elections in Louisiana for U.S. Representative, U.S. Senator, and Presidential Elector, and intend to do so again in future elections in Louisiana for the same offices.

- The Petitioners are public officials responsible for executing and enforcing Louisiana's election laws.

- Since the open primary first took effect in Louisiana congressional elections in 1978, there have been seventy regular elections for U.S. Representative held in Louisiana's eight (1978-1990) and later seven (1992-1994) congressional districts.

- Thirteen of the seventy regular elections for U.S. Representative held in Louisiana since 1978, or 18.5%, were uncontested when only one candidate qualified for the open primary and was thereby declared elected without a contested primary election.

- Forty-eight of the seventy regular elections for U.S. Representative held in Louisiana since 1978, or 68.5%, were determined conclusively in the contested open primary

and thus held on such day when one candidate received a majority of the vote and was thereby elected outright.

- Nine of the seventy regular elections for U.S. Representative held in Louisiana since 1978, or 12.8%, were held on the federal election day in November when the failure of any candidate to receive a majority of the vote in the contested open primary resulted in a run-off election.

- Of the fifty-seven contested regular elections for U.S. Representative held in Louisiana since 1978, forty-eight, or 84.2%, were determined conclusively in the open primary and thus held on such day, and nine, or 15.7%, were determined in run-off elections held on the federal election day in November.

- Since the open primary first took effect in Louisiana congressional elections in 1978, there have been six regular elections for U.S. Senator held in Louisiana. These elections took place in 1978, 1980, 1984, 1986, 1990, and 1992. All of these elections were contested.

- Five of the six contested regular elections for U.S. Senator held in Louisiana since 1978, or 83.3%, were determined conclusively in the open primary and thus held on such day when one candidate received a majority of the vote and was thereby elected.

> One of the six contested elections for U.S. Senator held in Louisiana since 1978, or 16.6%, was held on federal election day in November when the failure of any candidate to receive a majority of the vote in the primary resulted in a run-off election.

J.A. 28-31. The State did not deny these facts and hence they were deemed admitted pursuant to Uniform Louisiana Local Rule 2.10M.

The Voters moved for expedited consideration of the case pursuant to FED. R. CIV. P. 57. The district court granted the motion for expedited consideration, heard argument on the cross-motions for summary judgment on October 23, 1995, and took the case under advisement.

On April 11, 1996 the district court entered summary judgment in favor of the State. In a one-paragraph discussion of the merits, the ruling stated:

> This matter is before the Court on cross motions for summary judgment. After reviewing the record, the Court finds that there are no genuine issues of material fact, and that the defendants are entitled to judgment as a matter of law. The Court specifically finds that Louisiana's method of conducting Congressional elections does not violate the laws and Constitution of the United States.

J.A. 48. The same day the district court entered a separate final judgment in the State's favor. J.A. 47.

After learning of the district court's decision on April 23, 1996, the Voters filed their notice of appeal in the district court the next day. On April 25, 1996, the Voters filed an emergency motion for expedited appeal, which the United States Court of Appeals for the Fifth Circuit granted on April 26, 1996. Under the expedited briefing and argument schedule ordered by the court of appeals, argument was held on July 8, 1996.

On July 30, 1996, a divided panel of the court of appeals reversed the district court and issued a declaratory judgment "that Louisiana's election scheme conflicts with 2 U.S.C. §§ 1 and 7 to the extent that the Louisiana scheme authorizes a contested election for members of Congress to be decided in the open primary before the uniform federal election day." *Love v. Foster*, 90 F.3d 1026, 1031 (5th Cir. 1996). J.A. 60. The court of appeals declined, however, to award any immediate injunctive relief because of the disruptive effect such an injunction would have had on Louisiana's then-impending 1996 congressional elections, and remanded the case to the district court with instructions to consider injunctive relief if the Louisiana Legislature did not act to correct the problem in its 1997 session. *Id.* at 1031-32. J.A. 60-61.

On August 13, 1996, the State filed a suggestion for rehearing en banc in the court of appeals. Under 5TH CIR. R. 35.6 (Internal Operating Procedure accompanying Rule), a suggestion for rehearing en banc is also treated as a petition for panel rehearing.

On October 28, 1996, the State filed a petition for writ of certiorari in this Court.

On November 15, 1996, the court of appeals denied the State's suggestion for rehearing en banc and petition for panel rehearing, with three members of the full court

dissenting from the denial of rehearing en banc. *Love v. Foster*, 100 F.3d 413 (5th Cir. 1996) (per curiam). J.A. 73. In response to the petition for panel rehearing, the panel stated that

> all we hold is that Louisiana's election plan, to the extent that it precludes any legal election for United States Representatives and Senators on federal election day, conflicts with 2 U.S.C. §§ 1 and 7, and is invalid. Also, we do not suggest that Louisiana may not retain its open primary system. One way it can retain this system and avoid any conflict with the federal statute is to hold the open primary on federal election day and provide for a runoff election between November and January when the elected member of Congress takes office. *See* 2 U.S.C. § 8.

Id. at 413-14. J.A. 74.

On March 17, 1997, this Court granted the State's petition for writ of certiorari.

SUMMARY OF THE ARGUMENT

Louisiana law provides that its October congressional primary is a conclusive election if any candidate secures a majority of the votes cast in such primary. Federal law, however, requires that

congressional elections must occur on "the Tuesday next after the 1st Monday in November" (federal election day), 2 U.S.C. §§ 1, 7, and permits states to select another date for election only to the extent that there is a "failure to elect" on federal election day. 2 U.S.C. § 8. Because the timing of Louisiana's October congressional primary conflicts with the date mandated by 2 U.S.C. §§ 1 and 7, and because Congress has occupied the field of the timing of congressional elections (save for the narrow exceptions left to the states by 2 U.S.C. § 8), Louisiana law providing for the October congressional primary is preempted by 2 U.S.C. §§ 1 and 7.

ARGUMENT

I. FEDERAL LAW PREEMPTS LOUISIANA'S OCTOBER CONGRESSIONAL PRIMARY

A. Federal Law Requires That Congressional Elections Be Held on Federal Election Day in November

Article I, Section 4, Clause 1 of the United States Constitution states:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such

> Regulations, except as to the Places of chusing Senators.

U.S. CONST. art. I, § 4, cl. 1. The Framers fully understood that under this clause, Congress was given the power to establish "uniformity in the time of [congressional] elections." THE FEDERALIST No. 61 (Alexander Hamilton).[1] This principle was recently recognized by this Court in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 115 S. Ct. 1842 (1995). *Compare id.* at 808-09, 115 S. Ct. at 1857 (the Framers created a safeguard against State abuse of Time, Place and Manner regulation by giving Congress power to make or alter same) *with id.* at 895, 115 S. Ct. at 1899 (Thomas, J., dissenting) ("Article I gives Congress the ultimate authority over the times, places and manner of holding congressional elections.").

Acting pursuant to this constitutional authority, in 1872 Congress enacted 2 U.S.C. § 7, which in its present form provides:

> The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the

[1] Indeed, some of the Framers considered this power to establish a uniform date for congressional elections to be a "positive advantage." *Id. See also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 894-95, 115 S. Ct. 1842, 1898 (1995) (Thomas, J., dissenting) (§ 4 was defended at the Pennsylvania ratifying convention on the ground that "congressional elections should be 'held on the same day throughout the United States, to prevent corruption or undue influence'") (citing 2 ELLIOT'S DEBATES 535 (J. Elliot ed. 1937)).

> States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter.

Thus, the "Tuesday next after the 1st Monday in November" (federal election day) is the date established by Congress for elections of members of the House of Representatives in election years.

After the ratification of the Seventeenth Amendment (providing for the direct election of senators), Congress enacted 2 U.S.C. § 1, which in its present form states:

> At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said State shall be elected by the people thereof for the term commencing on the 3d day of January next thereafter.

2 U.S.C. § 1. By linking the election of U.S. Senators under this section with the election of U.S. Representatives, Congress plainly mandated that *all* elections for congressional representation be held on federal election day. Congress has further emphasized its goal of uniformity in the time of federal elections by

mandating that presidential electors be appointed "in each state" on federal election day. *See* 3 U.S.C. § 1.[2]

By mandating a uniform federal election day, Congress acted "to remedy more than one evil arising from the election of members of congress occurring at different times in the different states." *Ex parte Yarbrough*, 110 U.S. 651, 661, 4 S. Ct. 152, 157 (1884); *Busbee v. Smith*, 549 F. Supp. 494, 524 (D.D.C. 1982), *aff'd*, 459 U.S. 1166, 103 S. Ct. 809 (1983). Such evils included voting in an early election in one state and a later election in another state, CONG. GLOBE, 42d Cong., 2d Sess. 112-17 (1871), as well as unduly benefitting certain states and political parties and unnecessarily burdening voters with the requirement of voting in congressional elections and Presidential elections on different days in presidential election years. *Id. See also Busbee*, 549 F. Supp. at 524 (citing CONG. GLOBE, 42d Cong., 2d Sess. 141 (1871)). The principal congressional sponsor of Section 7, Representative Benjamin Butler, specifically sought to preclude "voting in October." *See* CONG. GLOBE, 42d Cong., 2d Sess. 112 (1871).

Finally, in the same 1872 legislation enacting Section 7, Congress provided for the contingency of a failure to elect on federal election day:

> The time for holding elections in any State, District, or Territory for a Representative or Delegate to fill a

[2] 3 U.S.C. § 1 provides: "The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President."

> vacancy, whether such vacancy is caused by *a failure to elect at the time prescribed by law*, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively.

2 U.S.C. § 8 (emphasis added). On its face, this provision is triggered only when an election on federal election day, the "time prescribed by law," results in "a failure to elect." If such a contingency occurs, the states may by law select a day *thereafter* to hold an election to fill the vacancy caused by the failure to elect on federal election day.[3]

In enacting Section 8, Congress fully anticipated that states with majority-vote requirements might experience a "failure to elect" on federal election day. During the consideration of the legislation providing for Sections 7 and 8, Senator Thurman explained that Section 8

> relates only to the case of a special election to fill a vacancy, *or where there is a failure to elect* [on federal election day]. It does not touch the general elections for members of the House of Representatives. The cases, therefore, to which it will apply are very rare indeed. It is very seldom that there is an election to fill a

[3] 2 U.S.C. § 8 applies equally to elections of U.S. Senators and U.S. Representatives. *Public Citizen v. Miller*, 813 F. Supp. 821, 829 n.8 (N.D. Ga. 1993), *aff'd*, 992 F.2d 1548 (11th Cir. 1993).

> vacancy, *and more seldom still that there is a failure to elect*. In all those States in which a plurality elects, no such thing as a failure to elect can occur unless there should be a tie, and in those cases I think in every State the right then is determined by lot . . . .
>
> I think, therefore, *there can be no failure to elect except in those States in which a majority of all the votes is necessary to elect a member, and they are very few in number*. Then there is no probability of there being a failure to elect so as to make this section necessary in many cases, and the vacancies that happen are very few indeed. The section itself, therefore, is rather inserted out of abundant caution than for any other reason.

CONG. GLOBE, 42d Cong., 2d Sess. 677 (1872) (remarks of Sen. Thurman) (emphasis added).

By its enactment of Section 7, Congress required all states, including those with majority vote requirements, to hold regular congressional elections on federal election day. Congress also anticipated that states with majority-vote requirements might experience a "failure to elect" on federal election day, and provided for this contingency in 2 U.S.C. § 8, which permits states to schedule post-federal election day run-off elections. *See Busbee*, 549 F. Supp. at 526 ("section 8 creates an exception to section 7's absolute rule in a limited class of cases"). *See also Public Citizen v. Miller*, 813 F. Supp. 821, 828-31 (N.D. Ga. 1993), *aff'd*, 992

F.2d 1548 (11th Cir. 1993) (upholding under Section 8 a post-federal election day run-off election of U.S. Senator necessitated by a failure to elect on federal election day). Thus, states with majority vote requirements can hold any necessary run-off election on a date subsequent to federal election day, so long as the initial attempt to elect is held on federal election day.

B. Louisiana Law Provides for Congressional Elections in October

Under Louisiana's election code, primaries for congressional and state offices are "open." All candidates, regardless of party affiliation, appear on the same ballot, and all voters, regardless of party affiliation, may vote in the open primary. *See* LA. R.S. § 18:401(B). With respect to congressional offices, Louisiana's election code provides that "primary elections shall be held on the first Saturday in October of an election year." LA. R.S. § 18:402(B)(1); *see also* LA. R.S. § 18:1272(A) (same).

By operation of LA. R.S. § 18:1271,[4] the following provision of the Louisiana election code applies to primary elections for U.S. Representative and U.S. Senator:

> Majority vote. A candidate who receives a majority of the votes cast for an office in a primary election *is elected*.

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[4] LA. R.S. § 18:1271 provides: "Except as otherwise specifically provided in this Part, United States senators and representatives in Congress shall be elected as provided in this Title for the election of public officers."

LA. R.S. § 18:511(A) (emphasis added). Thus, if a congressional candidate in the October primary secures a majority of the votes cast, that candidate "is elected" on that day, and no election for the congressional office is or can be held on federal election day: No candidate's name appears on the federal election day ballot, and no vote can be cast for the office on federal election day.

If there is a failure to elect in Louisiana's October congressional primary, that is, if no candidate secures a majority of the vote, Louisiana law provides for a run-off between the top two vote-getters in a so-called general election. *See* LA. R.S. § 18:481 ("the candidates who qualify for each office remaining to be filled in the general election are those who receive the two highest numbers of votes . . . *among those not elected in the primary election*") (emphasis added). When such a "general election" is necessitated by a failure to elect in the October primary, the general election is held on federal election day. *See* LA. R.S. § 18:402(B)(2); *see also* LA. R.S. § 18:1272(A) (same).

Generally speaking, "[a] primary election is simply a nominating device whose basic and fundamental purpose is the selection of candidates to be placed on the official ballot at a general election." 26 AM. JUR. 2D *Elections* § 228, at 42 (1996). This Court has recognized the distinction between primaries and general elections. Elections are the "final choice of an officer by the duly qualified electors," while primaries are "merely methods by which party adherents agree upon candidates whom they intend to offer and support for ultimate choice by all qualified electors." *Newberry v. U.S.*, 256 U.S. 232, 250, 41 S. Ct. 469, 472 (1921); *see also United States v. Classic*, 313 U.S. 299, 316-17, 61 S. Ct. 1031, 1038 (1941), *reh'g denied*, 314 U.S. 707, 62 S. Ct. 51 (1941) (noting the difference between one-step general election and two-step primary system where the first step, the primary, "is the choice . . .

of those candidates from whom, as a second step, the representative in Congress is to be chosen at the election").

In Louisiana, however, the October congressional "primary" is not simply a nominating device to qualify candidates or to winnow down the number of candidates to be placed on the ballot at the general election. Instead, as Louisiana law expressly recognizes, the "purpose" of the Congressional primary is "to elect persons to Congress." LA. R.S. § 18:401(A).[5] As the Fifth Circuit observed in an earlier case involving Louisiana election laws, in Louisiana, "[a] general election is held for an office *only if no one is elected to it as a result of the primary election process*, and the only candidates appearing on the general election ballot are those who 'survived' the primary." *Dart v. Brown*, 717 F.2d 1491, 1495 (5th Cir. 1983), *cert. denied*, 469 U.S. 825, 105 S. Ct. 105 (1984) (emphasis added). Consequently, Louisiana's so-called "primary" is an "election" for purposes of 2 U.S.C. §§ 1 and 7 because it contemplates the conclusive election of congressional candidates that receive a majority of votes cast.[6]

The undisputed facts in the record reveal that over eighty percent of the time, Louisiana's October

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[5] LA. R.S. § 18:401(A) provides: "Purpose. Primary and general elections are held to elect persons to Congress and to all the elective offices in this state, except the office of presidential elector."

[6] While virtually all other states use primaries, open, partisan, or otherwise, to determine which candidates for U.S. Representative or U.S. Senator will appear on the ballot on federal election day, the Voters are unaware of any other state in the Union which permits *conclusive* congressional elections in advance of federal election day.

congressional primary accomplishes its stated purpose under LA. R.S. § 18:401(A) of "elect[ing] persons to Congress." Between 1978 (when the open primary system first took effect in congressional elections) and 1994, Louisiana held seventy regular elections for U.S. Representative, of which fifty-seven were contested (in that more than one candidate qualified to appear on the October open primary ballot).[7] J.A. 30, ¶¶ 7, 11. Louisiana has also held six regular elections for U.S. Senator, all of which were contested. J.A. 30, ¶ 12. Of the contested elections, only nine elections (15.8%) for U.S. Representative and one election (16.7%) for U.S. Senator were held on federal election day. J.A. 30, ¶¶ 11, 14. The remaining *forty-eight* elections for U.S. Representative and *five* elections for U.S. Senator — *more than eighty percent* of the total number of contested congressional elections — were held on and conclusively determined in Louisiana's October primary. J.A. 30, ¶¶ 11, 13.

The potentially (and as the record reveals, usually) conclusive character of Louisiana's congressional primary is precisely what transforms it from a mere qualifying or winnowing primary into an outright election for purposes

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[7] The remaining thirteen elections for U.S. Representative in Louisiana were uncontested, *i.e.*, only one candidate qualified to appear on the open primary ballot and was therefore declared "elected" pursuant to LA. R.S. § 18:511(B). The Voters do not dispute that where only *one* congressional candidate "qualifies," in the sense of timely filing the appropriate candidacy papers and otherwise meeting the relevant age and residence requirements, that candidate is indeed "unopposed" on the federal election day ballot; and the State is *not* required to place such candidate's name on the federal election day ballot.

of 2 U.S.C. §§ 1 and 7. Were Louisiana's open primary a true "qualifying" primary, it could never be conclusive as a matter of law: It would only winnow to no fewer than two the number of candidates who actually appeared on the federal election day ballot.[8]

In sum, the earliest date that Louisiana can schedule conclusive congressional elections is federal election day. Primary elections, open or otherwise, in advance of federal election day, that narrow the field of candidates who will ultimately appear on the federal election day ballot *are* permissible under 2 U.S.C. §§ 1 and 7 so long as such "primaries" are not conclusive *ipso jure*. Put another way, pre-federal election day "primaries" cannot prematurely end the contest for Congress by themselves. Because Louisiana's October congressional "primary" contemplates conclusive elections in advance of federal election day, the court of appeals correctly held that the October primary fails this test and clashes with 2 U.S.C. §§ 1 and 7.

As the court of appeals specifically noted, *see Love*, 100 F.3d at 413-14, J.A. 74, Louisiana may retain its existing open primary system for congressional elections by simply adjusting the relevant dates so that the primary, as a potentially conclusive election, is held on federal election

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[8] A winner of a true qualifying primary might permissibly be declared "elected" as "unopposed" for purposes of 2 U.S.C. §§ 1 and 7 if state law permitted other candidates to qualify, by other primaries or otherwise, for the federal election day ballot, and no other candidates opted to qualify. Under Louisiana's open primary regime, however, if a candidate secures a majority of the votes cast in the open primary, that candidate is elected and there is no November election.

day, and any necessary run-off election is held thereafter, as contemplated by 2 U.S.C. § 8. Thus, the State's argument that the decision of the court of appeals interferes with Louisiana's prerogative to determine the *manner* of its congressional elections is baseless. The Voters challenge the *timing* of Louisiana's congressional primary, not its manner.

C. Because Louisiana's Open Primary Law Conflicts with Federal Law, It Is Unconstitutional Under the Supremacy Clause and Must Yield.

The Supremacy Clause of the U.S. Constitution provides that the Constitution and laws of the United States "shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2. As this Court's teachings make clear, "It is basic to this constitutional command that all conflicting state provisions be without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S. Ct. 2114, 2128 (1981); *see also Swift & Co. v. Wickham*, 382 U.S. 111, 120, 86 S. Ct. 258, 263 (1965) ("[I]f a state measure conflicts with a federal requirement, the state provision *must* give way.") (emphasis added).

"In determining whether a state statute is pre-empted by federal law and therefore invalid under the Supremacy Clause of the Constitution, our sole task is to ascertain the intent of Congress." *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 280, 107 S. Ct. 683, 689 (1987). When Congress enacted Section 7 into law, it delayed its operative effect until 1876 so that state election laws governing the timing of *state* elections could be aligned with the new federal date. In the words of Representative Butler, "The object of this amendment is to provide a uniform time of electing Representatives in

Congress, beginning with the elections for the Forty-Fourth Congress. My reason for putting it off till then is to allow some States time to change their constitutions. . . ." CONG. GLOBE, 42d Cong., 2d Sess. 112 (1871). As this legislative history makes clear, Congress intended to preempt state law as to the timing of congressional elections.

Furthermore, congressional intent to preempt may be inferred "where the state law at issue conflicts with federal law, . . . because the state law stands as an obstacle to the accomplishment and execution of congressional objectives." *Northwest Central Pipeline Corp. v. State Corp., Comm'n of Kansas*, 489 U.S. 493, 509, 109 S. Ct. 1262, 1273 (1989) (citing *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 404 (1941)).

Louisiana's October congressional primary clearly conflicts with 2 U.S.C. §§ 1 and 7. It ignores Section 7's mandate for elections on federal election day, replacing it with a binding election in October whenever a candidate secures a majority of the primary vote. This is precisely what the court of appeals held:

> We agree with [the Voters] that the Louisiana election system, as applied to elections for congressmen, conflicts with the federal statutes that establish a uniform federal election day and thwarts the congressional purpose of establishing a uniform day to prevent earlier elections from influencing later voters.

Love, 90 F.3d at 1031. J.A. 59. The court of appeals correctly concluded that because of Louisiana law's conflict with the federal statutes, Louisiana law must yield under the Supremacy Clause.

Congressional intent to preempt may also be inferred "where Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law." *Northwest Central Pipeline*, 489 U.S. at 509, 109 S. Ct. at 1273 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 67 S. Ct. 1146 (1947). However, "[t]here is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field." *Kelly v. Washington*, 302 U.S. 1, 10, 58 S. Ct. 87, 92 (1937). *See also Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 212-13, 103 S. Ct. 1713, 1726-27 (1983) (field preemption occurs when the federal government "completely occupies a given field *or an identifiable portion of it*") (emphasis added).

This Court has recognized that within the field of congressional elections, a state may act "to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under [Art. I] § 4 . . ." *Classic*, 313 U.S. at 315, 61 S. Ct. at 1037. Rather than enact legislation that occupies the entire field of the times, places and manner of congressional elections, Congress chose to regulate only an identifiable portion of such field, the timing of congressional elections. Nevertheless, Congress legislated very fully in that area. *See State v. Frear*, 142 Wis. 320, 125 N.W. 961, 970 (Wis. 1910) (finding Congress to have legislated "very fully" in enacting the federal election day statutes, and holding that "[s]uch legislation supersedes any state legislation covering the same subject-matter"). Congress, by enacting 2 U.S.C. §§ 1 and 7, preempted the field of the *timing* of congressional elections, save for the narrow exceptions under 2 U.S.C. § 8, which Congress left to the states.

Where, as here, Congress has occupied a given field or an identifiable portion of it, "the test of preemption is

whether 'the matter on which the State asserts the right to act is in any way regulated by the Federal Act.'" *Pacific Gas & Elec. Co.*, 461 U.S. at 213, 103 S. Ct. at 1727 (quoting *Rice*, 331 U.S. at 236, 67 S. Ct. at 1155). Because 2 U.S.C. §§ 1 and 7 regulate the timing of congressional elections, Louisiana law on the timing of congressional elections is preempted to the extent it does not fall within the area left to state control by 2 U.S.C. § 8. As Section 8 does not authorize Louisiana's October congressional primary, Louisiana law trespasses upon the field regulated by 2 U.S.C. §§ 1 and 7 and is preempted.

In sum, Louisiana's October congressional primary directly clashes with federal law because it allows for congressional elections on a date other than that prescribed by 2 U.S.C. §§ 1 and 7. Moreover, Congress has occupied the field of the timing of congressional elections, and Louisiana law providing for congressional elections in October encroaches that field. Thus, as the court of appeals correctly held, the Louisiana October congressional primary must yield under the Supremacy Clause.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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DATED: June 2, 1997